

Citation: *B. P. v. Minister of Employment and Social Development*, 2015 SSTGDIS 95

Date: August 26, 2015

File number: GP-15-1052

GENERAL DIVISION - Income Security Section

Between:

B. P.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

Decision by: Raymond Raphael, Member, General Division - Income Security Section

Heard by Videoconference on August 24, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

B. P.: Appellant

Elen Bereket: Appellant's representative

Arlene Wheeler: Registered nurse

INTRODUCTION & HISTORY OF PROCEEDINGS

[1] The Appellant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on May 17, 2010. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and on February 13, 2013 (decision released May 3, 2013) a Review Tribunal (RT) found that a disability pension is payable to the Appellant with a date of onset of June, 2012.

[2] The Questionnaire for Disability Benefits indicated that the Appellant was last employed between October 1988 and August 2009. He had been a fleet supervisor for the Alberta Motor Association (AMA), but was given an office position, due to limitations resulting from a heart attack. The Appellant indicated in the Questionnaire that he ceased working because his "heart [could not] take the work". He also noted that his memory was now very bad and that he fatigued easily. He described numerous functional limitations and restrictions.

[3] At the hearing before the RT in February 2013, the Appellant testified that he recently began working part-time at an auto repair shop, and that his attendance was irregular at times, due to his health. He testified that he was usually able to work two days a week, but sometimes had to cancel because of his health. He described his employers as benevolent. The Appellant estimated that he earned approximately \$1,000 per month from this employment, which was far less than his earnings had been at the AMA.

[4] The medical documentation before the RT was found to be supportive of the Appellant. The Appellant has been diagnosed with coronary artery disease, ischemic cardiomyopathy,

degenerative disc disease of the lumbar spine with chronic pain, hyperthyroidism, reflux esophagitis, dysthymia, and recurrent major depressive disorder.

[5] The RT accepted that the Appellant suffers from some “severe health difficulties”; however, it was mindful that he was engaged in some part-time employment at an auto repair shop. In assessing whether his disability could be found “severe” under the CPP, the RT examined whether the part-time employment qualified as “significantly gainful”. Ultimately, the RT concluded that the Appellant was unable to regularly engage in a “significantly gainful occupation”.

[6] On August 8, 2013 the Respondent applied for leave to appeal to the Appeal Division of the Social Security Tribunal (Tribunal). In its submissions seeking leave to appeal, the Respondent relied upon new evidence: a recent Record of Earnings (ROE) printed May 1, 2013, indicating that the Appellant had earnings of \$10,004 in 2011 and \$52,625 in 2012. In its submissions, the Respondent noted that the RT had found that the Appellant was disabled as of June, 2012, the year in which the evidence now shows that he earned \$52,626. The Respondent submitted that this establishes that the Appellant was substantially and gainfully employed in 2012. The Respondent also submitted that the RT made various errors of mixed fact and law.

[7] The Appeal Division granted leave to appeal on June 30, 2014 and on January 26, 2015 allowed the appeal on the ground that the RT decision was not defensible in law since the RT had failed to consider the Federal Court decision in *Fancy v. Canada*, 2008 FC 1414 at para. 13, and had incorrectly undertaken a comparative analysis of the Appellant’s earnings to determine if he was able to regularly pursue substantially gainful employment.

[8] The Appeal Division indicated that it is beyond its jurisdiction to decide on any “new evidence” which the Respondent might wish to place before it in the way of current Record of Earnings, even if they purportedly show that the Appellant has earnings in excess of levels which suggest that he was or is capable regularly of pursuing any “substantially gainful” occupation after his minimum qualifying period. The Appeal Division further indicated that this evidence has not been and should be tested, and should be reconciled, in the face of the Appellant’s testimony that his earnings were approximately \$1,000 per month.

[9] The Appeal was allowed and referred to the General Division for a rehearing consistent with the reasons. This is the rehearing ordered by the Appeal Division.

[10] The rehearing was by Videoconference for the following reasons:

- a) The Appellant will be the only party attending the hearing;
- b) Videoconferencing is available within a reasonable distance of the area where the Appellant lives;
- c) The issues under appeal are complex;
- d) There are gaps in the information in the file and/or a need for clarification;
- e) The method of proceeding is the most appropriate to address inconsistencies in the evidence; and,
- f) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[11] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[12] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) be under 65 years of age;
- b) not be in receipt of the CPP retirement pension;
- c) be disabled; and
- d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[13] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[14] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Records of Earnings

[15] A Record of Earnings (ROE) printed May 17, 2010 was the only ROE before the RT. This ROE did not reveal any pensionable earnings after 2009 and, accordingly, the RT proceeded on the basis that the MQP was December 31, 2012.

[16] A ROE printed May 1, 2013 was filed by the Respondent before the Appeal Division. This ROE revealed no pensionable earnings in 2010, and additional earnings of \$10,004 in 2011 and \$50,100 in 2012, which advanced the MQP to December 31, 2014.

[17] A ROE printed April 29, 2015 has been filed for the rehearing. This ROE reveals additional earnings of \$51,100 in 2013, and advances the MQP to December 31, 2016.

ISSUE

[18] The Tribunal finds that the MQP date is December 31, 2016 (based on 25 years of pensionable earnings and pensionable earning in three of the last six years).

[19] However, in order to qualify for a disability pension, a claimant cannot be in receipt of a retirement pension. Pursuant to subsection 66.1(1.1) of the Plan and subsection 46.2(2) of the Regulations, an individual can request a withdrawal of a retirement pension in favour of a disability pension if he or she is deemed to be disabled before the month the retirement pension became payable.

[20] The Appellant began receiving retirement benefits as of May 2015; therefore, he must be found to be disabled, within the meaning of the Plan, prior to May 1, 2015.

[21] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before April 30, 2015.

ORAL EVIDENCE

Appellant's Evidence

[22] The Appellant testified that his condition is essentially the same now as it was in April, 2015. He reviewed in detail his education and employment history. He has a grade 12 education, and he stated that he was promoted to management in every job he held. His employment history includes working as an explosive technician (he took courses for this back in the 1970s) and as a warehouse manager. He started working part-time for the AMA in 1988, and worked his way up to fleet supervisor and eventually provincial supervisor of all towing trucks.

[23] He suffered his first heart attack in 2004. They broke his ribs when they resuscitated him, and he also suffered a stroke. He was off work on Long Term Disability (LTD) for two years. When he returned to work he couldn't function as he did before, and he was gradually demoted ending up in a call centre handling complaints. He stopped working for the AMA in August 2009 because he couldn't handle the stress. He took his pension, went to Thailand for a couple of years, and lived off the proceeds from his pension. It was cheaper to live in Thailand and the weather was better for his arthritis. Also, the medications he needed were cheaper there, and he was under the care of a cardiologist. The only work he did in Thailand was teaching children to speak English for 1-2 hours a week. He came back to Canada because he had run out of money and to deal with a parking ticket – the car that he had donated to the Kidney Foundation was still in his name and had been towed away for a parking infraction. He applied for Alberta Works and was transferred to the Barriers to Employment program, which exempted him from pursuing employment because of this medical condition.

[24] His first suicidal episode was during the 1980s, when he overdosed on medication and was admitted to a 19 week, eight hours per day program. In 2005, he was diagnosed with severe depression after another suicidal episode. In June 2011 he was taken to the Royal Albert Hospital in handcuffs by the RCMP because of another suicidal episode (see GDR3-22). This was around the time that he returned to Canada.

[25] In 2011 he sent out resumes and was finally able to get a part-time job for an OK Tire franchise, which gradually became a full-time job. The franchise was operated by an Asian family and he stated that he was useful to them in dealing with their staff since he understood the Asian culture. He worked for the OK Tire franchise from October 2011 to November 2013, and acknowledged that his earnings were as set out in the ROE (see paragraphs 16 & 17, supra).

[26] When asked by the Tribunal why he testified before the OCRT in February 2013 that he was only earning \$1,000 per month when his earnings were more than four times that amount, the Appellant responded, "Maybe I lied to them...I must have been struggling for my life at that time...I thought they were paying me under the table." While he was working for OK Tire he had to use nitro three times a day because of chest pain, his arthritis was getting worse, and his overall condition was deteriorating. He stated "I had no quality of life." He had to stop taking Vioxx because it was taken off the market, and he took OxyContin for a short time, as well as 6- 8 Tylenol #3 per day. He stopped the OxyContin because it was too addictive. He now continues to take 6-8 Tylenol #3 per day for his pain.

[27] In March 2013 he suffered a second heart attack and underwent a stenting procedure. He was admitted on March 7, 2013 and discharged on March 10, 2013 (see GDR3-15). He stated that his condition had been getting worse, he was getting up at three in the morning to use the nitro spray because of chest pain, and he was missing a lot of time from work. He went for a stress test, and after about 20 seconds the cardiologist stopped the test and called for an ambulance to take him to the hospital.

[28] He was only off work for a couple of days - he went back to work because there were no benefits and he needed the money. He was terminated in November 2013; his manager told him that they were terminating him due to his medical condition since he couldn't do the work, but he couldn't write that down so he wrote that he was being terminated because of a shortage of work. The Appellant went on regular Employment Insurance for nine months, and acknowledged that he completed the certificates indicating that he was ready, able, and willing to work. He sent out resumes, but only got one interview. He stated that he applied for anything he could get, but he didn't think anyone would hire him once they saw his condition.

At the time his employment was terminated, he wasn't working satisfactorily – his memory was bad, he was making a lot of mistakes, and he couldn't read the manuals. He believes the situation would have been the same in any other job.

[29] In December 2004 he was admitted to the University of Alberta Hospital for a 16 week day treatment program because of another suicide attempt (see GDR3-10). He hasn't worked at all since November 2013, and he is now in the Alberta Works, Barriers to Employment program. When describing his day to day activities, he stated that he rents a room and sleeps between 12- 14 hours a day; he has to take two Tylenol 3 in the morning as soon as he wakes up and the side effects don't allow him to do very much; he tried to walk but is bent over and has to use a cane; he doesn't do any housekeeping or cleaning – sometimes he microwaves some food; he no longer drives and takes a bus if he has to go somewhere; he might read newspapers on a tablet but is in too much pain if he sits for any period of time. He stated that he “basically just lies in bed.”

[30] He suffers from memory loss, dizzy spells, fatigue, and suicidal depression. He takes numerous medications for anxiety, as a sleep aid, for pain, for high cholesterol, for high blood pressure, and for his heart condition. He sees Dr. Clarke for his prescriptions and sees his cardiologist on an annual basis. He saw a specialist for his back but when he went to the Back Institute they told him that nothing can be done other than taking pain medication. He is now attending a group therapy session at the University of Alberta Hospital on a weekly basis; in addition, he has weekly sessions with a psychologist, a social worker for talk therapy as well as another social worker at the Safe House, and with Ms. Wheeler. He was placed in the Safe House about a month ago because of the abusive environment where he was previously renting a room. He has been seeing cardiologists on a regular basis (including seeing a cardiologist when he was in Thailand), and he doesn't think his heart has ever been stable since the first heart attack. He thinks his heart condition isn't as bad since he stopped working because he no longer has to take nitro a couple of times a day as he did while he was working.

Arlene Wheeler's Evidence

[31] She is a public health registered nurse and her primary duties are providing psychiatric therapy to the geriatric population. Her first contact with the Appellant was on April 21, 2015 when the staff at The Seniors Safe House contacted her due to their concern about the Appellant's low mood, depression, overwhelming grief, and sense of loss. On the initial interview the Appellant had active suicidal ideations, memory loss, and was isolated. He had been bounced around from therapist to therapist, and felt that he had no connection with anyone. She noticed that he had problems with language, word finding, and short term memory – these symptoms are common with stroke victims. His employment barriers include his inability to focus, his chronic pain, his inability to sit for any period of time, his short term memory problems, and his not being able to learn new tasks.

MEDICAL EVIDENCE

[32] The Tribunal has carefully reviewed all of the medical evidence in the hearing file. Set out below are those excerpts the Tribunal considers most pertinent.

Dr. Clarke, Family Practitioner,

[33] A report dated May 23, 2010 from Dr. Clarke, the Appellant's family doctor, accompanied the CPP application. The report diagnosis coronary artery disease, a myocardial infarction in December 2004, and cardiac arrest from which the Appellant has been resuscitated. The report concluded that the Appellant has been compliant with all forms of treatment to date and that he has remained stable.

[34] On May 6, 2011 Dr. Clarke reported to the CPP that the Appellant is not having any chest pain at the present time but finds his exercise tolerance is reduced. The Appellant's main complaint is memory loss and difficulty with cognitive functioning. The Appellant also complained of backache which has persisted on a daily basis and is restrictive. The report concludes as follows:

His cardiac arrest places him at a high risk of another cardiac event.
His cognitive decline may progress as part of the natural aging process aggravated by his ischemic encephalopathy. The combination of the above factors make his prognosis very guarded. In addition the restrictions placed on him by his degenerative disc

disease limits his mobility, exercise tolerance and increases his risk of depression which will compound all the above problems.

After his myocardial infarction the patient did return to work and had major difficulty with the work environment and multitasking.

Dr. Stovel, psychiatrist

[35] On September 22, 2006 Dr. Stovel diagnosed dysthymic disorder, and major depressive disorder, recurrent in partial remission.

[36] On October 11, 2006 Dr. Stovel reported to Manulife that the Appellant presented with symptoms of depressed mood, fatigue, hypersomnia, suicidal ideation, loss of interest, feelings of hopelessness, and feelings of worthlessness. Dr. Stovel also reported that the Appellant attended treatment very regularly and actively participated in groups. Upon discharge, the Appellant's diagnosis was dysthymic disorder, major depressive disorder recurrent, in partial remission, personality disorder, and narcissistic and avoidance traits. The Appellant's Global Assessment of Functioning (GAF) was assessed as 65.

Dr. Paterson, cardiologist

[37] On December 16, 2008 Dr. Paterson, cardiologist, reported that the Appellant has felt well since his last visit 15 months ago; that he has had no episodes of chest pain; that he continues to go for long walks, weather permitting, and is able to climb three flights of stairs at work without difficulty; that he sleeps comfortably; that he no longer experiences anxiety over his infarct and is no longer seeing a psychologist; that he is presently going through a divorce; and that he is thinking of going to Thailand as owner/operator of a coffees shop.

X-rays

[38] X-rays of the Appellant 's back on January 11, 2011 revealed marked degenerative disc disease at L3-L4, L4-L5, and L5-S1. The x-rays also revealed an incidental note of degenerative disc disease at C5-C6.

March 13, 2013 Hospital Admission

[39] A short stay discharge summary prepared by Dr. Oudit, cardiologist, indicates that the Appellant was admitted to the hospital for high risk unstable angina on March 7, 2013 and discharged on March 10, 2013.

[40] In a medical assessment for Alberta Works dated October 14, 2014 Dr. Clarke reported that the Appellant's primary medical problems included chronic depression, dysthymic disorder, and coronary artery disease. The report notes mild/severe limitations in memory, comprehension, walking and standing, and mild limitations in the use of stairs. The report also notes that the Appellant is permanently unable to work, and that he is medically unable to attend a training or rehabilitative program.

Work Questionnaire & Medical Questionnaire

[41] In a CPP disability benefits work questionnaire, completed on April 16, 2015 the Appellant indicated that he was permanently disabled and that he was not currently working.

[42] In a CPP disability medical questionnaire, completed on April 16, 2015, the Appellant indicated that his current medical problems included a heart condition, two heart attacks, stroke, memory loss, degenerative arthritis, and severe chronic depression.

SUBMISSIONS

[43] Ms. Bereket submitted that the Appellant qualifies for a disability pension because:

- a) He suffers from multiple disabling conditions include his heart condition, the sequelae of his strokes and two heart attacks, severe depression, short term memory loss, chronic arthritic pain, fatigue, dizziness, and the side effects from multiple medications;
- b) He has a history of numerous suicide attempts;

- c) The Tribunal should take a “real world” approach when assessing the Appellant’s capacity to regularly pursue gainful employment;
- d) The Appellant has established a severe and prolonged disability as of November 2013, when his employment was terminated by OK Tire because of his medical condition.

[44] The Respondent submitted that the Appellant does not qualify for a disability pension because:

- a) Although the Appellant experiences limitations related to his condition, the evidence of his earnings supports that he maintained the capacity to perform suitable work within his limitations;
- b) His reported income for 2012 and 2013 is well over substantially gainful employment;
- c) Although the Appellant required acute medical intervention to treat unstable angina in March 2013, the information supports that his condition improved following medical intervention;
- d) No further consultation reports from a cardiologist have been submitted to support that the Appellant’s conditions are severe and preclude all suitable work activities;
- e) The Record of Employment issued by the KSC Holdings on November 29, 2013 indicates that the Appellant was employed from October 24, 2011 until November 30, 2013, and the reason that the Record of Employment was issued was Code A, which indicates a shortage of work/end of contract. This suggests that the Appellant’s most recent employment ended as a result of socio-economic factors rather than medical.
- f) While the Appellant’s condition may have prevented a return to more physically demanding jobs; medically managed cardiovascular disease would not be expected to preclude all types of work, including more suitable sedentary strength demand activities and/or part time employment.

ANALYSIS

[45] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before April 30, 2015.

Severe

[46] The statutory requirements to support a disability claim are defined in subsection 42(2) of the CPP Act which essentially says that, to be disabled, one must have a disability that is "severe" and "prolonged". A disability is "severe" if a person is incapable regularly of pursuing any substantially gainful occupation. A person must not only be unable to do their usual job, but also unable to do any job they might reasonably be expected to do. A disability is "prolonged" if it is likely to be long continued and of indefinite duration or likely to result in death.

Guiding Principles

[47] The following cases provided guidance and assistance to the Tribunal in determining the issues on this appeal.

[48] The burden of proof lies upon the Appellant to establish on the balance of probabilities that on or before April 30, 2015 he was disabled within the definition. The severity requirement must be assessed in a "real world" context: *Villani v Canada (Attorney General)*, 2001 FCA 248. The Tribunal must consider factors such as a person's age, education level, language proficiency, and past work and life experiences when determining the "employability" of the person with regards to his or her disability.

[49] All of the Appellant's possible impairments that affect employability are to be considered, not just the biggest impairments or the main impairment: *Bungay v Canada (Attorney General)*, 2011 FCA 47. Although each of the Appellant's medical problems taken separately might not result in a severe disability, the collective effect of the various diseases may render the Appellant severely disabled: *Barata v MHRD* (January 17, 2001) CP 15058 (PAB).

[50] The Appellant must not only show a serious health problem, but where there is evidence of work capacity, the Appellant must establish that he has made efforts at obtaining and maintaining employment that were unsuccessful by reason of his health: *Inclima v Canada (Attorney General)*, 2003 FCA 117. However, if there is no work capacity, there is no obligation to show efforts to pursue employment. Incapacity can be demonstrated in a number of different ways, for example, it can be established through evidence that the Appellant would be incapable of any employment-related activity: *C.D v MHRD* (September 18, 2012) CP27862 (PAB).

[51] An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate his disabilities; the phrase in the legislation "regularly of pursuing any substantially gainful occupation" is predicated upon the Appellant's capacity of being able to come to the place of employment whenever and as often as is necessary for him to be at the place of employment; predictability is the essence of regularity: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[52] It is a question of fact as to when a disability begins and when it becomes severe. In some cases the severity may occur in an instant. In other cases, it may take months or years for the disability to become severe as defined by the CPP. Further, a person may have a severe disability and not realize it because they are immobilized by other causes: *Forrester v MHRD* (November 3, 2003) CP 20789 (PAB)

Application of Guiding Principles

[53] The Appellant suffers from multiple disabling medical conditions which have been progressively worsening since his initial heart attack in 2004. Notwithstanding these conditions the Appellant was able to return to work with the AMA until August 2009, to travel to Thailand, and to then earn a significant income from OK Tire from October 2011 until November 2013. After his employment was terminated (the reasons for the termination are unclear), he received regular employment insurance for nine months, completed certificates confirming his ability to pursue employment, and made efforts to pursue

alternative employment. In view of this, the Tribunal does not agree with Ms. Bereket that the Appellant should be considered disabled as of November 2013.

[54] The Tribunal is, however, satisfied that the Appellant's conditions deteriorated after November 2013, and that at least by December 2014 when he was admitted to the Alberta Hospital after another suicide attempt his disability had progressed to severe (see *Forrester*, supra).

[55] The Tribunal has considered the cumulative effect of the Appellant's multiple conditions including chronic severe depression and anxiety, coronary artery disease, and chronic arthritic pain (see *Bungay* and *Barata*, supra). He is very limited in his daily activities and now sleeps for 12-14 hours a day; he attends counselling appointments four times a week; he has made several suicide attempts; he takes multiple medications which have significant side effects; and he is limited by memory loss, inability to concentrate, fatigue, headaches, chronic pain, and limitations in sitting, standing, and walking.

[56] Although the Appellant was able to continue working for many years despite his conditions, the Tribunal is satisfied that his conditions have progressed and that he lacks the capacity to regularly pursue any form of gainful employment. Due to his many limitations he could not be a regular and predictable employee (see *Bennett*, supra).

[57] The Tribunal finds that the Appellant has established, on the balance of probabilities, that he suffers from a severe disability in accordance with the CPP criteria.

Prolonged

[58] The Appellant's disabling conditions have been extant for many years and despite extensive and ongoing treatment he has been deteriorating.

[59] The Appellant's disability is long continued and there is no reasonable prospect of improvement in the foreseeable future.

CONCLUSION

[60] The Tribunal finds that the Appellant had a severe and prolonged disability in December 2014, when he was admitted to the University of Alberta Hospital for a 16 week day treatment program because of another suicide attempt. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of April 2015.

[61] The appeal is allowed.

Raymond Raphael
Member, General Division - Income Security